1879
10-47

Post

Examined & passed

Fairfield.

Submitted

Jan. 15. 1879.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~838.~~ 526

GEORGE B. FAIRFIELD, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF GALLATIN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 9. 1878.

Postponed until Nov. 1st

over the recess

SUPREME COURT OF THE UNITED STATES.

No. 838.

GEORGE B. FAIRFIELD, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF GALLATIN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Writ of error	*a*	1
Citation	*b*	1
Placita	1	2
Bond for costs	2	2
Summons	3	3
Declaration	4	3
Memorandum of coupons	10	6
Rule to plead	11	7
Demurrer	11	7
Leave to amend declaration	12	7
Amended declaration	13	8
Plea and stipulation	14	8
Stipulation to submit cause without jury	14	9
Judgment	15	9
Bill of exceptions	16	10
Section 7 of charter	17	10
Sections 3, 10, 12, and 13 of amendatory act	19	11
Copy of bond	24	14
Testimony of Barger	28	15
Petition of Thomas S. Ridgway	30	17
Copy of records of Gallatin county	32	17
Stipulation to submit under Rule XX	37	20
Bond on writ of error	38	20
Clerk's certificate	40	21

a UNITED STATES OF AMERICA, *ss.*

The President of the United States to the judges of the Circuit Court of the United States for the Southern District of Illinois, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court, before you, between George B. Fairfield and the county of Gallatin, a manifest error hath happened, to the great damage of the said George B. Fairfield, as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Springfield, in said district, this twentieth day of September, in the year of our Lord eighteen hundred and seventy-eight, and of our independence the one hundred and third year.

[SEAL.] J. A. JONES, *Clerk.*

b UNITED STATES OF AMERICA, *ss.*

To the county of Gallatin, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Southern District of Illinois, wherein George B. Fairfield is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Samuel H. Treat, judge of the District Court of the United States for the Southern District of Illinois, this twentieth day of September, in the year of our Lord eighteen hundred and seventy-eight, and of our independence the one hundred and third year.

S. H. TREAT.

I acknowledge service of the above citation, this September 20th, 1878.

BLUFORD WILSON,
Defendant's Attorney.

1 Pleas in the Circuit Court of the United States of America for the Southern District of Illinois, held at the city of Springfield, in said district, before the Hon. Samuel H. Treat, district judge of said district, and, in the absence of the Hon. Thomas Drummond, judge of the seventh judicial circuit, *pro tempore* sole judge of said court, on Tuesday, the 8th day of August, at the June term of said court, in the year of our Lord eighteen hundred and seventy-eight, and of our independence the one hundred and third year. J. A. JONES, *Clerk.*

GEORGE B. FAIRFIELD
vs.
THE COUNTY OF GALLATIN. } In Assumpsit.

SOUTHERN DISTRICT OF ILLINOIS, *ss.*

George B. Fairfield, a citizen of the State of New York, puts in his place Messrs. Scholes & Mather, his attorneys, against the county of Gallatin, a body corporate and politic existing under the laws of the State of Illinois, and a resident of the southern district of Illinois, defendant, which puts in its place Messrs. Wm. G. Bowman, A. D. Duff, and Bluford Wilson, its attorneys, in a plea of assumpsit.

2 SOUTHERN DISTRICT OF ILLINOIS, *ss.*

Be it remembered, that heretofore, to wit, on the 18th day of December, in the year of our Lord eighteen hundred and seventy-seven, came said plaintiff by his said attorneys and filed in the office of the clerk of said court his bond for costs in said cause, which said bond for costs is in the words and figures following, to wit:

Bond for Costs.

Circuit Court of the United States of America, Southern District of Illinois. Jany. term, A. D. 1878.

GEORGE B. FAIRFIELD
vs.
THE COUNTY OF GALLATIN. } In Assumpsit. Damages $10,000.

We do hereby enter ourselves security for costs in this cause, and acknowledge ourselves bound to pay or cause to be paid all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this state and of the United States.

Dated this 14 day of Dec., 1877. SCHOLES & MATHER.

(Endorsed:) Filed December 18th, A. D. 1877. J. A. Jones, clerk.

3 And afterwards, to wit, on said eighteenth day of December, in the year last aforesaid, there was issued out of said clerk's office a summons in said cause, which said summons, together with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, } ss.
SOUTHERN DISTRICT OF ILLINOIS. }

The United States of America to the marshal of the Southern District of Illinois, greeting:

We command you to summon the county of Gallatin, if found in your district, to be and appear before our judges of our Circuit Court of the United States for the Southern District of Illinois, on the first day of the next term thereof, to be held at Springfield, in the district aforesaid, on the first Monday of January next, to answer unto George B. Fairfield of a plea of trespass on the case upon promises to his damage, as he alleges, of ten thousand dollars, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield aforesaid, this eighteenth day of December, in the year of our Lord one thousand eight hundred and seventy-seven, and of our independence the one hundred and second year.

[L. S.] J. A. JONES, *Clerk.*

4 (*Return of Marshal.*)

I hereby appoint John Yost my special deputy to execute this writ. Dec. 19, '77.

E. R. ROE, *U. S. Mar.*

STATE OF ILLINOIS, } ss.
GALLATIN COUNTY. }

I have duly executed this writ by reading it and delivering a true copy thereof to Edgar Mills, the chairman of the Board of County Commissioners of Gallatin county, Illinois.

E. R. ROE, *U. S. Marshal,*
By JOHN YOST,
Special Deputy U. S. Marshal.

(Endorsed:) Filed January 7th, A. D. 1878. J. A. Jones, clerk.

And afterwards, to wit, on the 28th day of December, in the year A. D. 1877, came said plaintiff by his said attorneys and filed in said clerk's office his declaration and copy of instrument sued on in said cause, which said declaration and copy of instrument sued on are in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA, } ss.
SOUTHERN DISTRICT OF ILLINOIS. }

In Circuit Court, Jany. term, A. D. 1878.

5 George B. Fairfield, who is a citizen of the State of New York, plaintiff, by Scholes & Mather, his atty's, complains

of the county of Gallatin, a body corporate and politic existing under the laws of the State of Illinois, and located in said southern district, the defendant, of a plea of trespass on the case on promises. For that whereas said defendant heretofore, to wit, on the first day of January, 1870, made, executed, and delivered to the Illinois Southeastern R. R. Company its certain fifty-three negotiable bonds or obligations in writing, all of which are fac similes of each other except the numbers thereon, and bond No. one thereof being in the words and figures following, to wit:

"No. 1. UNITED STATES OF AMERICA. $1,000.00

State of Illinois, Gallatin County Railroad Bond.

Registered by auditor of public accounts of the State of Illinois. Principal and interest collected and paid by the treasurer of State of Illinois: Know all men by these presents, that the county of Gallatin, State of Illinois, acknowledges itself to owe and be indebted to the Illinois Southeastern Railway Company, or bearer, in the sum of one thousand dollars, which sum the said county of Gallatin promises to pay at the American Exchange National Bank, in the city of New York, on the first day of January, A. D. 1890, the said county reserving the right to pay this bond at any time after five years from the date of its issue, with interest at the rate of
eight per centum per annum, payable semi-annually, on the
6 first days of July and January of each year, on the presentation and surrender of the annexed coupons. This bond is one of a series of bonds issued by Gallatin county to aid in the construction of the Illinois Southeastern railway, in pursuance of the authority conferred by an act of the general assembly of the State of Illinois, entitled an act to incorporate the Illinois Southeastern Railway Company, approved February 25th, 1867, and an act amendatory thereof, approved February 24th, 1869, and of an election of the legal voters of Gallatin county, Illinois, held on the 12th day of February, 1868, under the provisions of said act. This bond is not to become a binding obligation on the said county of Gallatin until the following conditions *is* complied with, to wit: that is to say, this bond shall be delivered when such part of said road as lies within the limits of Gallatin county is fully completed and the cars running thereon, and shall bear date on the first day of January or first day of July next succeeding the time of said delivery. But it is expressly agreed, that unless the said Illinois Southeastern railway shall be completed and the cars running thereon through the limits of Gallatin county on or before the 12th day of February, A. D. 1871, that neither this bond, nor any or either of the said series of one hundred bonds of one thousand dollars each, shall be issued or delivered to any person or corporation whatever.

7 And for the payment of the said sum of money and the interest accruing thereon in the manner aforesaid, upon the performance of said condition, the faith of the said county of Gal-

latin is hereby irrevocably pledged. In testimony whereof, the said county of Gallatin has executed this bond by causing the county judge to subscribe his name hereunto, and to be countersigned by the clerk of this court, and affixing the seal of said court. All done by and under the order of the county court, at Shawneetown, this the 1st day of January, A. D. 1870.

MILTON BARTLEY, *County Judge.*

Countersigned by—Jos. B. BARGER, *County Clerk.*

And plaintiff further alleges that said bonds, so as aforesaid executed and delivered, had attached thereto interest coupons for the semi-annual interest thereon falling due, for $40 each, numbered to correspond with the bond to which they respectively belonged.

Plaintiff further avers that each of said coupons were signed by Jo. B. Barger, as county clerk of said county, and in and by each of said coupons the defendant promised to pay bearer the sum of forty dollars, on the day of the maturity thereof, at the American Exchange National Bank, in New York city. Plaintiff further avers that said coupons are fac similes of each other, except as to the number of the bond thereon referred to and their dates of maturity, and that the following is a true copy of all of said coupons, leaving blank said number and the date of maturity, to wit:

8

"No. —. The county of Gallatin, State of Illinois, will pay the bearer forty dollars, on the — day of ———, A. D. 18—, at American Exchange National Bank, in New York city, being interest on railroad bond.

"JO. B. BARGER, *County Clerk.*"

Plaintiff further avers that he did on, to wit, the first day of January, A. D. 1876, at New York city, become the purchaser, owner, and bearer of one hundred and eighty of interest coupons belonging to said bonds, for value, in the usual course of business, without notice of any defence and before due, to wit, coupons belonging to bonds numbered 1–20, 23, 31–32, 35, 37–38, 40–49, 71–75, 76–78, 81–86, 87, 88–89, 95.

Whereby plaintiff avers that the defendant became liable to pay plaintiff the sums of money in said coupons mentioned, when due, upon demand, and being so liable, plaintiff avers that defendant did then and there, to wit, on the first day of January, A. D. 1876, at, to wit, said southern district, promise to pay plaintiff said sums of money in said coupons mentioned, when thereafter requested. And plaintiff avers that said coupons were long past due before the bringing of this suit, and although plaintiff requested payment thereof of defendant, defendant refused to pay the same or any part thereof, to the damage of plaintiff, ten thousand dollars, wherefore he brings suit by—

9

SCHOLES & MATHER, *his Attys.*

Copy of Instrument sued on.

No. —. The county of Gallatin, State of Illinois, will pay the bearer forty dollars, on the —— day of ———, 18—, at American Exchange National Bank, in New York city, being interest on railroad bond. JO. B. BARGER, *County Clerk.*

The defendant is hereby notified that plaintiff will produce at the trial, and rely upon in evidence, one hundred and eighty coupons, fac similes of the foregoing copy, except as to the numbers and dates of maturity, which are as shown by the memorandum herewith filed. SCHOLES & MATHER.

(Endorsed:) Filed Dec. 28, 1877. J. A. Jones, clerk.

And afterwards, to wit, on said 28th day of December, in the year last aforesaid, came said plaintiff, by his said attorneys, and filed in said clerk's office his memorandum of coupons sued on in said cause, which said memorandum is in the words and figures following, to wit:

Memorandum of Coupons.

UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF ILLINOIS. } *ss.*

In Circuit Court, Jany. term, A. D. 1878.

GEORGE B. FAIRFIELD *vs.* THE COUNTY OF GALLATIN.

The defendant in the above-entitled cause is hereby notified that plaintiff will introduce in evidence, and rely upon, one hundred and eighty interest coupons, being in the words and figures following, (excepting the dates of maturity and the numbers thereon corresponding to the Nos. on the bonds to which they respectively belonged), to wit:

"No. —. The county of Gallatin, State of Illinois, will pay the bearer forty dollars, on the —— day of ——, A. D. 18—, at American Exchange National Bank, in New York city, being interest on railroad bond. JO. B. BARGER, *County Clerk.*"

53 Due July 1st, 1876, Nos. 1–20, 31–32, 35, 37, 38, 40–49, 71–78, 81–89, & 95.
49 Due Jany. 1st, 1877, Nos. 1–20, 31–32, 35, 37, 38, 40–49, 71–72, 75–78, 82–84, 86–89, & 95.
30 Due July 1st, 1877, Nos. 1, 31–32, 35, 37, 38, 40–49, 71–72, 75–78, 82–84, 86–89, & 95.
24 Due Jany. 1st, 1878, Nos. 1, 31–32, 35, 37, 38, 40–48, 76–78, 82, 86–89, & 95.
24 Due July 1st. 1878, Nos. 1, 31–32, 35, 37, 38, 40–42, 44–48, 76–78, 82, 86–89, & 95.
180 SCHOLES & MATHER, *Attys. for Plff.*

(Endorsed:) Filed December 28th, 1877. J. A. Jones, clerk.

11 And afterwards, to wit, on Tuesday, the 8th day of January, at the January term of said court, in the year of our Lord eighteen hundred and seventy-eight, the following proceedings were had in said court, in said cause, and entered of record, to wit:

Rule to Plead.

GEORGE B. FAIRFIELD
vs. } Assumpsit.
COUNTY OF GALLATIN.

On motion of plaintiff, by Messrs. Scholes & Mather, his attorneys, the defendant having been regularly served with process, is ruled to plead herein by to-morrow morning.

And afterwards, to wit, on the 9th day of January, in the year last aforesaid, came said defendant by its attorneys, and filed in said court its demurrer in said cause, which said demurrer is in the words and figures following, to wit:

Demurrer.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF ILLINOIS. } *ss.*

In the Circuit Court, January term, A D. 1878.

GEORGE B. FAIRFIELD
vs. } Assumpsit.
COUNTY OF GALLATIN.

12 And the defendant comes and defends, &c., and says the said declaration and each and every count thereof are insufficient in law for the said plaintiff to have and maintain the aforesaid action against these defendants, and this they are ready to verify.

Wherefore, &c., DUFF, BARR & LEMMA,
AND BLUFORD WILSON, *for Defts.*

(Endorsed:) Filed January 9th, 1878. J. A. Jones, clerk.

And afterwards, to wit, on the 19th day of January, at the term and in the year last aforesaid, the following further proceedings were had in said court, in said cause, and entered of record, to wit:

Leave to Amend Declaration.

GEORGE B. FAIRFIELD
vs. } Assumpsit.
COUNTY OF GALLATIN.

On motion of plaintiff, by Messrs. Scholes & Mather, his attorneys, leave is granted to amend declaration and summons.

And afterwards, to wit, on said 19th day of January, in the year aforesaid, came said plaintiff by his attorneys, and filed in said

clerk's office his amended declaration in said cause; which
13 said amended declaration is in the words and figures following, to wit:

Amended Declaration.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF ILLINOIS. } ss.

In Circuit Court, Jan'y term, 1878.

GEORGE B. FAIRFIELD
vs.
GALLATIN COUNTY.

And now comes the plaintiff by his att'ys, and by leave of the court amends his narr. filed herein, by striking out all thereof after the word "defendant" on line 12 of p. 1, down to and inclusive of the word "railroad" on line 18, p. 1, thereof.

SCHOLES & MATHER, *Att'ys for Pl'ff.*

(Endorsed:) Filed January 19, 1878. J. A. Jones, clerk.

And afterwards, to wit, on the 8th day of August, in the year last aforesaid, came the parties by their attorneys, and filed in said clerk's office their plea and stipulation and stipulation to submit cause without a jury; which said plea and stipulations are in the words and figures following, to wit:

14 *Plea and Stipulation.*

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF ILLINOIS. }

In Circuit Court, June term, A. D. 1876.

GEORGE B. FAIRFIELD
vs.
THE COUNTY OF GALLATIN. } Assumpsit.

And the defendant, by Bluford Wilson, its atty., comes and defends the wrong and injury, when, etc., and says that he did not undertake and promise in manner and form as the plaintiff has in his declaration thereof complained against it, and of this it puts itself upon the country, etc.

By WM. G. BOWMAN,
A. D. DUFF, AND
BLUFORD WILSON,
its Attorneys.

It is stipulated in the above-entitled cause that defendant may, under the general issue, prove any defence which would be well pleaded by special plea and a proper and legal defence.

SCHOLES & MATHER, *for Plff.*

(Endorsed:) Filed August 8, 1878. J. A. Jones, clerk.

Stipulation to submit cause without jury.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF ILLINOIS. }

In Circuit Court, June term, A. D. 1878.

15 GEORGE B. FARFIELD
vs.
THE COUNTY OF GALLATIN. } Assumpsit.

It is hereby stipulated and agreed by the attys. in the above-entitled cause, to submit the same for trial to the court without the intervention of a jury, under § 649 and § 700 of U. S. Rev. Statutes of 1874.

SCHOLES & MATHER, *Attys. for Plff.*
WM. G. BOWMAN,
A. D. DUFF, AND
BLUFORD WILSON, *Attys. for Deft.*

(Endorsed:) Filed August 8th, 1878. J. A. Jones, clerk.

And then, afterwards, to wit, on Thursday, the 8th day of August, aforesaid, at the June term of said court, in said year, the following further proceedings were had in said court, in said entitled cause, and entered of record, to wit:

Judgment.

GEORGE B. FAIRFIELD
vs.
THE COUNTY OF GALLATIN. } In assumpsit.

And now, on this 8th day of August, 1878, come the parties, by their counsel, and submit this cause to the court for trial,
16 without the intervention of a jury; and the court having heard their proofs and allegations, finds the issue in favor of the defendant.

It is, therefore, ordered and adjudged by the court, that the defendant recover of the plaintiff its costs in this behalf expended, to be taxed, and that it have execution therefor.

And thereupon the plaintiff tenders his bill of exceptions, which is signed and sealed and ordered to be made part of the record in this cause.

And thereupon, on motion of the plaintiff, a writ of error to the Supreme Court of the United States, to operate as a supersedeas, is allowed him, on his entering into bond to the defendant, in the penalty of $500, conditioned as the law directs, with security to be approved by the clerk of this court, within sixty days from this date.

Bill of Exceptions.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF ILLINOIS. }

In Circuit Court, June term, A. D. 1878.

GEORGE B. FAIRFIELD
vs.
THE COUNTY OF GALLATIN. }

Be it remembered, that on the trial of this cause, at the June term, A. D. 1878, of the said circuit court, the cause being tried by the court, a jury having been waived by stipulation of the parties, the court specially found the following facts upon which it based its judgment, to wit:

That the general assembly of the State of Illinois enacted a law, which went into force February 25th, 1867, entitled "An act
17 to incorporate the Illinois Southeastern Railway Company," § 7 of which provides as follows:

Section 7 of Charter.

§ 7. The county court, or board of supervisors, (where such county has adopted township organization,) of any county into or through which this road or its branch may pass, is hereby authorized and fully empowered to donate to said company, as a bonus or inducement towards the building of said railroad or its branch, any sum not exceeding one hundred thousand dollars, and may order the clerk of the county court or board of supervisors of such county to issue bonds of the county to the amount donated; and such clerk of the county court or board of supervisors, as the case may be, of such county, shall countersign and deliver such bonds so issued to the president or directors of said company; which said bonds may bear any rate of interest not to exceed ten per cent. per annum, payable at maturity of the bonds, as hereinafter expressed, and yearly thereafter: *Provided*, That no donation by the county court or board of supervisors of any such county shall be of a greater sum than fifty thousand dollars, until after the question of such larger donation shall have been submitted to the legal voters of such county, at an election to be called, conducted, returns made, convassed and published, in the usual manner of calling, conducting, making returns, convassing and publishing special county elections; at which election each voter shall vote a ticket upon which is written or printed the words "For Donation" or "Against
18 Donation," and if a majority of the ballots cast at such an election be in favor of donation, it shall be the duty of the county court or board of supervisors of such county so voting to donate some amount, not less than fifty thousand dollars, nor more than one hundred thousand dollars, to said company, and to order the issuing of bonds of the county, as hereinbefore provided, for

the amount so donated; which bonds shall be made payable to the directors of said company, and may be in any denomination of not less than one hundred nor more than one thousand dollars each, at the discretion of the said county court so issuing the same: *Provided*, That the bonds of any county so donated and issued shall not mature nor become due or payable nor any of the interest accruing thereon, or upon any part thereof, until the said company shall have completed or caused to be completed so much of the line of said road or its branch as may be within the county so donating, or when some certain specified section or part of the road shall have been finished, as may be agreed upon between this company and county court or board of supervisors of the county making the donation; and each of said bonds shall declare upon its face the condition upon which it is to become due.

That said general assembly enacted a further law, which was approved February 24th, 1869, entitled "An act to amend an act entitled an 'Act to incorporate the Illinois Southeastern
19 Railway Company,'" §§ 3, 10, 12, and 13 of which provide as follows:

Sections 3, 10, 12, *and* 13 *of Amendatory Act.*

§ 3. And whereas, doubts exist as to the time when the interest upon the bonds to be issued and delivered to said company, under the provision of section seven (7) of said act, is to begin to run, and as to when said bonds are finally to become due and payable to any holder thereof; now, therefore, be it further enacted, that the true intent and meaning of said section is, and it is hereby so declared to be, that said bonds, so to be issued, shall not be delivered to said company nor become binding obligations of the several counties issuing the same, nor shall interest be payable thereon until the said company shall have completed or caused to be completed so much of the line of said road as may be within the county so donating, or when some certain specified section or part of the road shall have been finished, as may be agreed upon between said company and the county court, or board of supervisors, as the case may be, of the county making the donation; then, and in all such cases, an amount of such bonds may be issued, proportioned to the length of such completed section or sections, and the county court or board of supervisors of said counties, respectively, may make and issue such bonds, payable to the directors of said company, or bearer, or otherwise, so as to make them negotiable by delivery, having such time to run and bearing such rate of interest, not exceeding ten per cent.
20 per annum, payable annually or semi-annually, in or out of the state, as may be agreed on by them and said railway company, and conformable to the terms upon which said donations were or may be, respectively, voted for in said counties—the interest to be payable to bearer, according to interest coupons attached to said bonds.

§ 10. That any village, city, county, or township organized under the township-organization law, or any other law of this state, along or near the route of said railway or its branches, or that are in anywise interested therein, may, in their corporate capacity, subscribe to the stock of said company or make donations to said company, to aid in constructing and equipping said railway: *Provided*, That no such subscription or donations shall be made until the same shall be voted for, as hereinafter provided. That whenever twenty legal voters of any such city, village, county, or township shall present to the clerk thereof a written application, requesting that an election shall be held, to determine whether such village, city, county, or township shall subscribe to the capital stock of said company or make a donation thereto, to aid in building or equipping said railway, stating the amount, and whether to be subscribed or donated, and the rate of interest and times of payment of the bonds to be issued in payment thereof, such clerk shall receive and file such application, and shall immediately proceed to post written or printed notices, calling an election to be held by the legal voters of
21 such village, city, county, or township, which notice shall be posted in ten of the most public places of such village, city, county, or township for thirty days preceding an election; and said notices shall state fully the objects of such election; and such election shall be held and conducted and returns thereof made as general elections provided by law in this state and as provided by the charters of any such village or city: *Provided*, That at any election held under the provisions of this act, it shall not be necessary to cause a registration of the voters of such villages, cities, counties, or townships; and if the majority of votes cast at such election shall be in favor of such subscription or donation, then the corporate authorities of such village, city, county, or township organized under the township-organization laws of this state, the supervisors of such township shall subscribe to the capital stock of said company or donate thereto, as shall have been determined at such election, the amount so voted at such election, and shall issue the bonds, with interest coupons attached, of such village, city, county, or township to said railway company, in such denominations as said railway company may designate, said bonds drawing interest at a rate not exceeding ten per cent. per annum, and the interest on said bonds to be paid semi-annually, and said bonds to be paid in twenty years from the date of their issue, with the privilege reserved to the said villages, cities, counties, or townships of paying said bonds at any time after five years from the date of their issue; and said bonds to be signed, in case of a village, by the chairman of the board of trustees thereof;
22 in case of a city by the mayor thereof; in case of a county, by the county judge or the chairman of the board of supervisors thereof; and in case of a township, by the supervisor thereof; and, in all cases, to be countersigned by the clerk of said village, city, county, or township. And any such village, city, county, or

township subscribing or making donation to such railway, as aforesaid, shall, by its proper corporate authorities, annually thereafter levy and collect a sufficient tax on its assessed property to pay the interest on its bonds issued as aforesaid, as the interest becomes due, and provide in due time to pay the principal at maturity.

§ 12. That when payment of subscription to the capital stock of said company, or payments for donations to said company, have been or shall be made by villages, cities, counties, or townships, in bonds of such villages, cities, counties, or townships, under any act authorizing such subscription or donation to be made, all such bonds issued or negotiated by the proper authorities of such villages, cities, counties, or townships, and appearing regular on the face thereof, shall, in the hands of said company or any other *bona fide* holder thereof, be deemed and taken, in all courts and elsewhere, as *prima facie* evidence of the regularity of everything required by the several acts in relation to the issuing of said bonds, or by any other act to be done preliminary to the issuing and negotiation of said bonds.

23 § 13. Whereas, in section seven, of the act to which this is an amendment, it was provided that any bonds in payment of any donations made by counties to said railway company, that each of said bonds should declare upon its face the conditions upon which it should become due; and whereas, the election notices heretofore issued by the proper authorities of any such counties making donations to said railway company, as well as the act to which this act is an amendment, contains certain conditions required to be fulfilled by said railway company before the bonds of such county should become due and payable, and which conditions were by such notices, as well as by the act to which this act is an amendment, required to be inserted in the face of such bonds to be issued by such counties; therefore, *be it further enacted*, that upon a full and complete performance by said company of all the conditions upon which said bonds were to become binding obligations of the counties issuing the same, it shall be the duty of the county court or the board of supervisors, where such county is under township organization, of the respective counties making such donations, to enter an order upon their records, at a regular or special term of their court, directing the clerk of such court to certify, over his official seal, upon the back of each of said bonds so issued, in language as follows, viz: "All of the conditions upon which this bond
24 was to become a binding obligation of the county of ——— have been complied with."

That defendant, on, and prior to, Feby. 28th, 1868, was a lawfully organized and existing county, under the laws of the State of Illinois, and located along and near the route, and was interested in, the Illinois Southeastern Railway Company.

That on the 28th day of February, 1868, an election of the legal voters of said county was held and conducted in pursuance of the

provisions of said acts, to determine whether said county would donate $100,000 of its bonds in aid of the said road, upon certain conditions to be named therein, and that the said election resulted in authorizing their issue.

That one hundred thousand dollars of said bonds so authorized by said election were afterwards issued by the county judge and county clerk, under the order and direction of the county court, the form thereof being in the words and figures following, except the numbers, to wit:

Bond.

No. 1. UNITED STATES OF AMERICA. $1,000.

State of Illinois.

Gallatin County Railroad Bond.

Registered by auditor of public accounts of the State of Illinois. Principal and interest collected and paid by the treasurer of the State of Illinois.

Know all men by these presents, that the county of Gallatin, State of Illinois, acknowledges itself to owe and be in-
25 debted to the Illinois Southeastern Railway Company, or bearer, in the sum of one thousand dollars, which sum the said county of Gallatin promises to pay, at the American Exchange National Bank, in the city of New York, on the first day of January, A. D. 1890, the said county reserving the right to pay this bond at any time after five years from the date of its issue, with interest at the rate of eight per centum per annum, payable semi-annually on the first days of July and January of each year, on the presentation and surrender of the annexed coupons. This bond is one of a series of bonds issued by Gallatin county to aid in the construction of the Illinois Southeastern railway, in pursuance of the authority conferred by an act of the general assembly of the State of Illinois, entitled "An act to incorporate the Illinois Southeastern Railway Company," approved February 25th, 1867, and an act amendatory thereof, approved February 24th, 1869, and of an election of the legal voters of Gallatin county, Illinois, held on the 12th day of February, 1868, under the provisions of said act.

This bond is not to become a binding obligation on the said county of Gallatin until the following conditions is complied with, to wit: that is to say, this bond shall be delivered when such part of said road as lies within the limits of Gallatin county is fully completed and the cars running thereon, and shall bear date on the first
26 day of January or first day of July next succeeding the time of said delivery. But it is expressly agreed that unless the said Illinois Southeastern railway shall be completed and the cars running thereon through the limits of Gallatin county, on or before the 12th day of February, A. D. 1871, that neither this bond, nor any or either of the said series of one hundred bonds of one thousand dollars each, shall be issued or delivered to any person or corporation whatever. And for the payment of the said sum of money

and the interest accruing thereon, in the manner aforesaid, upon the performance of said condition, the faith of the said county of Gallatin is hereby irrevocably pledged.

In testimony whereof, the said county of Gallatin has executed this bond by causing the county judge to subscribe his name hereunto, and to be countersigned by the clerk of this court, and affixing the seal of said court. All done by, and under the order of, the county court, at Shawneetown, this, the 1st day of January, A. D., 1870.

[L. S.] MILTON BARTLY, *County Judge.*

Countersigned by—

Jo. B. BARGER, *County Clerk.*

(Across the face:) One thousand dollars.

(Endorsed:)

STATE OF ILLINOIS, } ss.
GALLATIN COUNTY. }

I, Joseph B. Barger, clerk of the County Court of Gallatin
27 County, in the State of Illinois, do hereby certify that the county court of said *court* have entered an order on the records of said county court, directing me to endorse upon this bond the following words, to wit: All the conditions upon which this bond was to become a binding obligation of the county of Gallatin have been complied with.

In testimony whereof, I hereto affix my hand and the seal of said court, at Shawneetown, this 8th day of October, A. D. 1870.

[L. S.] JO. B. BARGER, *Clerk.*

That the coupons sued on belonged to said issue of bonds, and were purchased by plaintiffs before due, in the usual course of business, for value, without notice of any defences, except such constructive notice, if any, as the law would imply, from the bonds, and county court records of Gallatin county.

The defendant offered in evidence the testimony of Joseph B. Barger to show that the bonds had been antedated Jany. 1st, 1870, but were not actually issued and delivered until Oct. 6th or 8th, 1870, to the admission of which testimony plaintiff then and there objected, on the ground that the county was estopped from contradicting the date on the face of the bonds in the hands of plaintiff.

28 The court overruled plaintiff's objection and admitted the evidence, which was as follows:

Testimony of Barger.

Joseph B. Barger, being first duly sworn by me as a witness in the above cause, to tell the truth, so far as he should be interrogated, deposed as follows, to wit:

Interrogatory first. What is your name, age, residence, and occupation?

Answer to interrogatory first. My name is Joseph B. Barger; will be sixty-three February 2nd, 1877; reside in Shawneetown, Illinois. I am clerk of the county court of this county, and have been such clerk since December, 1856.

Interrogatory second. Examine Exhibit "E," and state whether it is a sample of the one hundred donation bonds of $1,000 each with the coupons thereto attached which were filled up, issued, and donated by Gallatin county to the Illinois Southeastern Railway Company.

Answer to second interrogatory. The exhibit marked "E" is a sample of the one hundred donation bonds of $1,000 each, with the exceptions of the punching of the bond and coupons. It
29 is a sample of the bonds which were issued as such donation. Except that this sample is punched—

Interrogatory third. State who delivered said bonds to Benjamin Kinsall, the trustee, and state, as near as you can, the time said bonds were so delivered.

Answer to third interrogatory. I, as county clerk, delivered said bonds to Benjamin Kinsall, as trustee, on the 8th day of October, A. D. 1870. I am enabled to state these facts by a receipt in my possession given me by Benjamin Kinsall, trustee, for said bonds, bearing date the said 8th day of October, 1870.

Interrogatory fourth. State the time, as near as possible you can, that the date of these bonds were actually filled up, and by whom.

Answer to interrogatory fourth. It was between the 6th and 8th of October, 1870. The dates were filled up by my deputy in my presence, and the bonds and coupons signed by me.

Interrogatory fifth. Were said bonds truly dated as of the day and date they were actually filled up and issued? And if not, state how they were dated.

Answer to fifth interrogatory. These bonds were not dated
30 as of the day and date they were actually filled up and delivered, but antedated the first of January, 1870. I was directed by all parties concerned to put in that date.

JOSEPH B. BARGER.

Subscribed and sworn to before me by the said Joseph B. Barger, on the 9th day of December, 1876.

CARL ROEDEL,
Master in Chancery.

To the ruling of the court in admitting this evidence plaintiff then and there excepted and preserved this his exception.

Defendant further offered in evidence as tending to prove the same points, the following petition of Thomas S. Ridgway, pres. of the railroad company, to county court, from the files of the said court, and the records of the said county court showing the orders thereon, both as follows:

Petition of Ridgway.

SHAWNEETOWN, ILLINOIS, *October 6th*, 1870.

To the honorable the county court of Gallatin county.

GENTLEMEN: Whereas, by a vote of the people of Gallatin county, on the 12th day of February, 1868, said county of Gallatin
31 agreed to subscribe and donate to the Illinois Southeastern Railway Company, to assist and induce said company to build a railroad through the county, as follows, say, two hundred thousand dollars in bonds of said county, and all of swamp lands belonging to said county, and also the "old railroad grade," all of which was to be delivered and conveyed to said railroad company upon the completion of the railway through the limits of said county; and whereas, the Springfield and Illinois Southeastern Railway Co., successors of the Illinois Southeastern Railway Company, having now completed its railway through the limits of Gallatin county, and the cars now running thereon from the Ohio river to the north line of Gallatin county, in accordance with the vote of the people of said county. Now, therefore, I, Thomas S. Ridgway, president, in behalf of said railway company, do this day apply to your honorable court for the delivery of one hundred and fifty thousand dollars of said Gallatin county bonds—say 100,000 donation bonds and 50,000 of the subscription bonds, the remaining twenty-five thousand dolls. of subscription bonds to be held in reserve, and to be delivered to my company hereafter, say, whenever our contractors, Messrs. Cutler, Dodge & Co., shall build, or cause to be built, the earthen embankment from the Ohio river to the high ground in the rear of the city of Shawneetown, above
32 highwater mark of 1867.

THOMAS S. RIDGWAY,
President S. and Illinois S. E. R'y Co.

Copy of County Record.

STATE OF ILLINOIS, } *ss.*
GALLATIN COUNTY. }

At a call term of the county court for said county for county business, to be holden at the court-house in the city of Shawneetown, Thursday, 6th day of October, 1870.

Present, Hon. Milton Bartley, county judge; Ajax Fillingim, associate; Benjamin Kinsall, associate; Joseph B. Barger, clerk; Joseph Ulmsnider, sheriff.

Ordered that Benjamin Kinsall give bonds as trustee to deliver railroad bonds and deed to swamp lands, in the penal sum of $200,000, conditioned that he will deliver the bonds and deed to the Springfield and Illinois Southeastern Railway Company when ordered so to do by the county court, and that he collect all accrued interest on said bonds before delivering, or cut off such coupons as are due on the delivery.

Ordered that the county clerk proceed to sign the coupons and prepare for delivering all subscription and donation bonds voted

33 by the voters of Gallatin county to the Illinois Southeastern Railway Company, and that he also make out and sign, as clerk of said county court, a deed to the swamp lands of said county, in accordance with the vote of the people; that he sign and execute said deed as clerk, aforesaid, and that the county judge sign the $75,000 subscription bonds, and the *one* $100,000 donation bonds shall be prepared. He and the said clerk is authorized and required hereby to deliver the said deed and bonds all over to said trustee Kinsall, taking his receipt therefor.

And it is further ordered that the action of said clerk in delivering $25,000, of the $100,000, subscription bonds aforesaid, on the 17th of March, 1870, be by the court now sanctioned and ordered, the said bonds having been delivered on the verbal order of the court.

Ordered, that the bond of Benjamin Kinsall, as trustee, be spread of record and considered, approved by the court, securities being considered sufficient, and that said bond be filed by the clerk and recorded, and is in words and figures as follows, to wit:

Bond.

Know all men by these presents, that we, Benjamin Kinsall, as principal, and Joshua Bradley, Thomas S. Ridgway, Jno. McKee Peeples, Charles Carroll, Wm. L. Blackard, John Crawford, and W. G. Bowman, as his securites, are held and jointly
34 bound unto the county of Gallatin, Ills., in the penal sum of two hundred thousand dollars, for the payment of which, well and truly to be made, we bind ourselves and legal representatives jointly, severally, and firmly by these presents.

In witness whereof, we hereto set our names and seals, this 6th day of Oct., 1870.

The above bond to be null and void if the said Kinsall, as trustee appointed by the county court of said county to deliver railroad bonds, &c., in lieu of John D. Richeson, shall deliver all railroad bonds and deed to swamp lands in accordance with, and in obedience to, any order of the county court hereafter to be made, otherwise said bond to remain in full force.

Attest: WM. D. PHILL.

BENJ'N KINSALL.
his
JOSHUA × BRADLEY.
mark.
THOMAS S. RIDGWAY.
J. McKEE PEEPLES.
CHARLES CARROLL.
GEO. A. RIDGWAY.
W. L. BLACKARD.
JOHN CRAWFORD.
WM. G. BOWMAN.

Approved and ordered to be filed by the clerk, Oct. 6th, 1870.

MILTON BARTLEY, *Co. Judge.*
AJAX FILLINGIM.

Order.

35 Ordered, that Benjamin Kinsall, trustee, deliver to the Springfield and Illinois Southeastern Railway Company, in Gallatin county bonds, $50,000 of the subscription bonds, and $100,000, the donation bonds, to said company, and that he collect the interest or cut off in coupons enough to cover all accrued interest thereon up to date of delivery, and that he deliver the same as soon as they shall be prepared by the clerk.

On Saturday, Oct. 8th, 1870, the same being the 3d day of said call term, the following proceedings were had, to wit:

Order.

And it is further ordered by the court, that the clerk is hereby directed to endorse on each of the $100,000 donation bonds the following words, to wit: All the conditions upon which this bond was to become a binding obligation of the county of Gallatin have been complied with.

Order.

Ordered, that the levy for Gallatin county for paying interest on railroad bonds issued by said Gallatin county, be one dollar to the one hundred dollars valuation of taxable property in said county for the year 1870, and the clerk is ordered to extend the same on the collector's book of 1870.

To the admission of which evidence plaintiff then and there objected for same reasons as before, but the court overruled the objection and admitted the evidence, to which ruling of the
36 court plaintiff excepted at the time, and hereby preserves his said exceptions.

The court further finds, specially, the following facts, from the evidence aforesaid introduced by defendant, to wit:

That sometime, on or about October 6th, 1870, the Springfield and Illinois Southeastern Railroad Company, the successor, by lawful consolidation, of the Illinois Southeastern railroad, had completed the conditions upon which the said bonds had been voted, and, upon application of its president therefor, the County Court of Gallatin County, having passed over the completed road and received the same on behalf of the county, by an order, dated October 8th, 1870, ordered said bonds to be executed and delivered to said railroad company.

That the said bonds, with the coupons in suit, among others attached, were executed and delivered to said railroad company about October 8th, 1870, in pursuance of said order of the county court, and the bonds were antedated, by some understanding or agreement of the county officers and railroad officers, the 1st day of January, 1870.

Upon which foregoing special findings the court rendered judgment for the defendant, on the authority of Town of Concord

37 vs. Portsmouth Savings Bank, 2 Otto, 625, to which findings and judgment plaintiff at the time excepted, and prays that this his bill of exceptions be signed, sealed, and made a part of the record, which is done. S. H. TREAT. [L. S.]

(Endorsed:) Filed August 8th, 1878. J. A. Jones, clerk.

And afterwards, to wit, on said 8th day of August last aforesaid, came the parties in said cause, by their attorneys, and filed in said clerk's office their stipulation to submit said cause under Rule XX. of U. S. Supreme Court, which said stipulation is in the words and figures following, to wit:

Stipulation to Submit under Rule XX.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF ILLINOIS.

In Circuit Court, June term, A. D. 1878.

GEORGE B. FAIRFIELD
vs.
THE COUNTY OF GALLATIN. } Assumpsit.

It is hereby stipulated and agreed by the respective att'ys of record in the above-entitled cause that said cause shall be submitted under Rule XX. of the U. S. Supreme Court, at its Oct. term, A. D. 1878.

38 SCHOLES & MATHER,
Atty's for Pl'ff.
BLUFORD WILSON,
A. D. DUFF,
WM. G. BOWMAN,
Att's for Deft.

(Endorsed:) Filed August 8th, 1878. J. A. Jones, clerk.

And afterwards, to wit, on the 19th day of September, in the year last aforesaid, came said plaintiff, by his attorneys, and filed in the said clerk's office his bond on the writ of error in said cause, which said bond is in the words and figures following, to wit:

Bond on Writ of Error.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF ILLINOIS.

In Circuit Court, June term, A. D. 1878.

GEORGE B. FAIRFIELD
vs.
THE COUNTY OF GALLATIN.

Know all men by these presents, that we, George B. Fairfield, as principal, and O. J. Bailey, of Peoria co., Ills., and C. T. Mather,

of Sangamon co., Ills., as surety, are held and firmly bound
39 unto the county of Gallatin in the sum of five hundred dollars, to be paid to the said county of Gallatin, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and firmly by these presents.

Sealed with our seals and dated this 19th day of September, A. D. 1878.

Whereas the above-named George B. Fairfield hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the said circuit court. Now, therefore, the condition of this obligation is such that if the above-named George B. Fairfield shall prosecute his said appeal to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

GEORGE B. FAIRFIELD, [SEAL.]
Per T. C. MATHER, *Atty. in fact.* [SEAL.]
T. C. MATHER. [SEAL.]
O. J. BAILEY. [SEAL.]

Approved by me, this 19th Sept., A. D. 1878.
J. A. JONES, *Clerk.*

(Endorsed:) Filed September 19th, 1878. J. A. Jones, clerk.

40 UNITED STATES OF AMERICA, } *ss.*
SOUTHERN DISTRICT OF ILLINOIS. }

I, John A. Jones, clerk of the Circuit Court of the United States in and for said Southern District of Illinois, do hereby certify that the foregoing is a true and correct copy of all the papers filed and proceedings thereon had in a certain cause wherein George B. Fairfield is plaintiff and the county of Gallatin is defendant, as fully and completely as the same appear of file and of record in my said office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Springfield, in said district, this 23rd day of September, in the year of our Lord eighteen hundred and seventy-eight, and of our independence the one hundred and third year.

[SEAL.] J. A. JONES, *Clerk.*

(Endorsed on cover:) S. Illinois C. C. U. S. No. 838. George B. Fairfield, plaintiff in error, vs. The County of Gallatin. Filed 9th October, 1878.

Field.

ADDITION TO RECORD 526.

---

1 STATE OF ILLINOIS:

Supreme court, central grand division.

At a supreme court, begun and held for the central grand division of the State of Illinois, at Springfield, on the first Tuesday after the first Monday in January, A. D. 1879, present, Hon. Alfred M. Craig, chief justice; Benjamin R. Sheldon, justice; John M. Scott, justice; John Schofield, justice; Pinkney H. Walker, justice; T. Lyle Dickey, justice; David J. Baker, justice, to wit: On the first day of October, A. D. 1879, there was filed in the office of the clerk of said court an opinion of said court, in the words and figures following:

Appeal from appellate court, third district.

CHARLES E. LIPPINCOTT ET AL.
vs.
TOWN OF PANA ET AL.

BAKER, J.:

The Pana, Springfield, and Northwestern Railroad Company was incorporated February 16th, 1865 (P. L. 1865, vol. 2, p. 192).

The charter of said corporation was amended April 15th, 1869 (P. L. 1869, vol. 3, p. 330).

The substance of the original act and amendment thereto, as regards the matter of subscriptions to the capital stock of said company
2 by townships was to the effect, that any town, in any county, which had adopted township organization might subscribe to its capital stock in any sum not exceeding $50,000, if authorized by a vote of the people, but that no such vote should be taken unless at a regular election for town or county officers. No power was given to townships to make donations to the corporations. As the bonds here in controversy were voted and issued as a donation and not as a subscription, and amounted to $100,000, and there is no pretence they were voted at a regular election for town or county officers, and as they do not purport to have been issued under or by virtue of either of said charters or amendment, it is not perceived either of said acts shed material light upon the matter of the validity of these bonds.

The act to incorporate the Illinois Southeastern Railway Company was passed Feb'ry 25th, 1867 (P. L., 1867, vol. 2, p. 750). Section' nine and ten of said charter empowered any town in any county under township organization to donate to said company any amount not to exceed $30,000, if a majority of all votes cast be for such proposition at an election which should be held, canvassed, and returned as other regular town elections. It was also required no such election should be held until the directors of said company had filed a proposition to the inhabitants of said town with the county clerk of the county wherein such town was situated and a copy of same with the clerk of the town, and that if there

was a newspaper published in said county, then said proposition should be published in full in the same.

Said statute, after providing for the posting of notices of the time and place of such election and making other provisions in reference thereto, contained this requirement: "And such county clerk
3 shall, upon the application of the company, after the donation so voted by any such town shall have become due or payable under the terms and conditions of the proposition upon which said election was ordered, compute and assess upon all the taxable property in said town an amount sufficient to pay such donation or any part or installment of the same so then being due and payable; which taxes so assessed shall be collected as other taxes, and the taxes so collected shall be paid to the treasurer of said company."

In Town of Middleport v. Ætna Life Ins. Co., 82 Ill., 562, it was held by this court that where a law authorized the donation of money by municipal corporations to aid in the construction of a railroad and provides for levying a tax to raise the amount to be donated, then neither such municipal corporation or its officers have power to borrow money or issue bonds in payment of such donation, and that bonds issued in payment thereof are void. Moreover the sum here claimed as donated is $100,000, whereas the act expressly limited the amount and required it should not exceed $30,000, and it clearly appears the directors of the company did not make a proposition to the inhabitants of the town as required by the enabling act; and by that act they, and they alone, had power to initiate the election. We think it manifest this donation cannot be held valid by virtue of this original charter of the Illinois Southeastern Railway Company.

The charter of this latter company was amended on the 24th day of February, 1869 (P. L. 1869, vol. 8, p. 308). Thereby townships under township organization were empowered to subscribe to the stock of said railway company, or make donations to said company to aid in constructing or equipping said railway, "provided that no such sub-
4 scriptions or donations shall be made until the same be voted for as hereinafter provided."

There is nothing in the last-mentioned act expressly limiting the amount of such subscriptions or donations, and no reference thereto further than the requirement. The written application therein provided for requesting an election be held should state "the amount, and whether to be subscribed or donated, and the rate of interest and times of payment of the bonds to be issued in payment thereof." For the purposes of this case we may, without examination, admit this amendment authorized a subscription or donation to an amount limited only by the amount stated in the written application. The act, among other things, provided, in section ten, "such elections shall be held and conducted and returns thereof made as general elections provided by law in this State," and contained a proviso "that at any election held under the provisions of this act it shall not be necessary to cause a registration of the voters."

The Springfield and Illinois Southeastern Railroad Company was the result of a consolidation of the Pana, Springfield and Northwestern Railroad Company and the Illinois Southeastern Railway Company. The charters of both of the original and constituent corporations expressly authorized consolidation, and the general law of the State, then in force, provided for consolidation of railroad companies, and enacted that "said companies when so consolidated shall have all the powers, franchises, and immunities which said respective companies shall have

by virtue of their respective charters before consolidation." (Laws 1854, p. 9, s. 1 & 2; Robertson v. City of Rockford, Ill. 21, 452.)

We deem it unnecessary here to determine whether the amendatory act of February 24th, 1869, either on the theory it embraces the whole subject-matter of the prior statute, or on the theory there is a palpable repugnancy between the two enactments, must be taken as an repeal by implication of the former statute or any of its provisions, or whether it is to be regarded as auxilliary and cummulative to the old law, or simply as changing and modifying that old law in some respects. In the view we take of the case, the result in either event is the same, and the inquiry is superfluous.

It appears from the record the election at which the alleged donation with various conditions was voted to the Consolidated Railroad Company was held as an ordinary special township meeting, presided over by a moderator then and there chosen and sworn as such. The record of the meeting and of the proceedings thereof, including the determination as to the proposed donation and other matters submitted to it, was signed by the moderator and town clerk. The vote on the donation was by ballot. As we have seen, the amendment to the charter of the Illinois Southeastern Railway Company required that the election should be held, conducted, and returns thereof made as general elections provided by law in this State. In counties under township organization the statute expressly provides "the supervisor, assessor, and collector of the town shall be ex-officio judges of all elections in their town, except as otherwise provided by law." In the case of The People ex. rel. v. Town of Santa Anna (67 Ill., 57), the act authorizing the vote for the subscription required that "all elections had under or by virtue of this act shall be taken and held to be general elections, and conducted in the manner as provided by the laws of this State for general elections." And it appeared the election there in question was held as a mere town meeting and was presided over by moderator chosen at the time, and that neither the supervisor, assessor, nor collector participated in holding the election. We there held the election invalid; and said the election was conducted as an ordinary town meeting presided over by a moderator, while the law required that the supervisor, assessor, and collector should be the judges of the elections, and, of course, hold the same. The person chosen as moderator may have been equally competent, but it is sufficient to say he was not the officer authorized by the law to discharge the duty. It is like judicial proceedings where there is no jurisdiction. The law required the election to be held by set of officers, and it has been held by another.

That ends the argument. The supervisor when he made this subscription had not been authorized to do so by a vote of the people taken in the manner required by the law. The subscription was therefore a nulity." In The People ex rel. v. Town of Laena, Id. 65, the legislative act involved was the same as that in the case just cited, and the election was conducted entirely by the moderator and the town clerk in the same manner as an ordinary town meeting is conducted. It was there said, "The enabming act means precisely what is expressed, that the election shall be taken and held to be a general election, and have all the requisites of such an election. There must be judges and clerks; there must be a registry of voters and all else required by the general election law." And in the same case it was fur'er said, "The relators where they undertook the work knew or might have known the manner in which the election was conducted. It was their duty to know it was not conducted according to the law authorizing an election. It is a question of

power, and the hardships or injustice of the case demand no consideration. This determines the case. In the cases where these decisions were rendered the bonds had not been issued, but in at least one
7 of them equities of the complaining railroad company had intervened. The court decided it was a question of power, that it was like a judicial proceeding where there was no jurisdiction, and that a subscription based on such an election was a nul'ity.

In this case the bonds have been issued and have passed into the hands of innocent holders, and the town has paid interest thereon for three years. And the question arises whether it and its tax-payers are estopped thereby from denying the validity of the bonds. If the bonds are absolutely void, the defence may be interposed, but if only voidable, then it may not. An election is not void when it is held by persons who are not officers de jure but are officers de facto and act in good faith under colorable authority. Here the law provides for a board of three judges of election, and designated the supervisor, assessor, and collector as such board. Had a majority of the board acted, or had one of the board together with one or more other persons assuming to act as judges of the election presided thereat, or had three or even two persons, and they all other than those designated by law, officiated under color of an appointment, however defective, and assumed to act as judges of the election and as the board designated by the law, a different question would have been presented. Perhaps there might be then ground to hold such persons to be de facto officers and constituting a de facto board of election judges, but here there was no assumption to act as any board, there was no person pretending to be judge of an election, there were no persons appointed or designated in any manner to take the places of the de jure officers, nor were there even persons who as intruders or otherwise assumed to officiate as an election board or to be de facto or temporarily the officers or judges designated by law.

8 The case is this: The law required as a condition precedent to the existence of the power to issue bonds an affirmative vote at an election held and conducted as a general election. There not only was no such election, but there was no pretence of holding such election. At the election held not only the officers designated by law failed to act, but no person took upon themselves to fill their places temporarily or otherwise, or assumed to act and perform the duties of such officers; on the contrary, one other person who was chosen to fill another and different office, that of moderator of a special town meeting, assumed, in his character as such moderator, functions the law had expressly delegated to other and different officers. The election to be other than void should have been held and conducted, if not by the tribunal designated and authorized by the statute, at least by persons assuming to act as such tribunal; it was essential to the exercise of the powers conferred there should be an election at least purporting to be held as a general election. The township had no power to substitute a town meeting for an election. If the sheriff of a county, assuming to act only as sheriff, should perform a duty the law imposed exclusively upon the county clerk, it could hardly be successfully claimed that such sheriff was in performance of such act de facto county clerk. One of the separate sections of the constitution of 1870, reads as follows: "No county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: Provided, however, That the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscription where the same have been authorized

under existing laws by a vote of the people of such municipility
9 prior to such adoption." We may admit a donation to be within the saving clause of the proviso. (C. & I. R. R. Co. v. Pinckney, 74 Ill., 277; Middleport v. Ætna Life Ins. Co., 82 Ill., 568.) Yet the inquiry becomes pertinent, What was the legal status of this particular donation when this constitutional provision went in force in 1870? At that time the bonds had not been issued, nor is it even claimed had the railroad company *had* done work or expended money on the faith of the proposed donation, or had accepted the conditions attached to the donation, or had given notice of the acceptance of the donation. It cannot be claimed there was at that time any contract between the township and the railroad company to be impaired or any right vested in the company. Had then this donation been authorized under existing laws by a vote of the people of the township? Plainly not. The vote had was not under existing laws. The only existing law that would authorize the donation of one hundred thousand dollars required a vote of the people at an election that should be held, conducted, and returns thereof made as a general election. There was no law to empower the township to vote such donation at a town meeting, as we have seen from the decisions of this court in The People v. The Town of Santa Anna, and People v. Town of Laemma. The election had was like a judicial proceeding where there is no jurisdiction. That there was no vote of the people in the manner required by the law, that there was no power conferred by the election, and that it was a nul'ity. If, after the new constitution went in force, the company had sought by mandamus to compel the issue of these bonds, it is evident from the cases cited they would have had no standing in court. There was at that time not only
no existing legal obligations resting on the township, but
10 no power in it to issue these bonds. How and by virtue of what in 1873 did the power arise? The action taken since the adoption of the present constitution by either *of* the officers or the people of the township is immaterial. The power to bind had been taken away by that instrument in 1870; the township was bound by no obligation to the company, and as there was no prior vote of the people under existing laws to authorize it to thereafter make a valid contract or donation, that which the township officers thereafter assumed to do in that regard was vain and void and of no effect. (Jackson Co. v. Brush et al., 77 Ill., 50; Middleport v. Ætna Life Ins. Co. supra.) Each bond of the series recited it was "one of a series amounting to $100,000, issued by said township in compliance with a vote of legal voters thereof at a election held on the 30th day of April, 1870, by virtue of authority conferred by an act of the general assembly of the State of Illinois, entitled 'An act to incorporate the Illinois Southeastern Railway Company, approved F'b'ry 25th, 1867, and an act amendatory thereto, approved F'b'ry 24th, 1869." The purchasers of these bonds could readily have ascertained by reference to the first-mentioned act it did not authorize the donation *of* a township of an amount to exceed $30,000. And by reference to the last-mentioned act, even if that act, as claimed, authorized a donation to an unlimited amount, that it required an affirmative vote of the people of the township at an election held and conducted as a general election, and the fact the election recited to have been held on the 30th day of April, 1870, was not and did not purport to be such an election, was patent upon the face of the public records of the proceedings thereof.

It is the long established rules of this court that where there is an entire absence of power as distinguished from a defectice ex-

11 ecution of a power, then the recitals of those invested with the ministerial duty of issuing municipal bonds will afford no protection to even bona fide holders for value of such bonds. (Force v. Town of Batavia, 61 Ill., 100; Williams v. Town Roberts, 88 Ill., 18, and authorities there cited.)

If the bonds were issued without authority and were void, the levy of taxes and payment of interest would not render them valid (Schuyler County v. Farwell, 25 Ill., 181; Marshal County v. Cook, 38 Ill., 48). Indeed, if it be admitted that when the new constitution went into force there was no obligation and no power to enter into an obligation, it is difficult to perceive upon what theory or principle, admissions or recitals thereafter made, or acts thereafter done, created a power in the very teeth of the constitution itself. It can hardly be the fundamental law of the land can thus be evaded and the ministerial officers of the municipalty can confer upon it, by mere recital, a power it is by that explicitly prohibited from exercising.

The view we take of this case obviates the necessity of examining the numerous other points made therein and discussed by counsel.

The judgment of the appellate court is affirmed.

Affirmed.

I, E. A. Snively, clerk of said supreme court, do hereby certify the foregoing to be a true copy of the opinion of said court in said cause, as the same appears from the records and files of my office.

In testimony whereof I hereunto set my hand and the seal of said court, at Springfield, this 8th day of October, A. D. 1879.

[SEAL.]

E. A. SNIVELY,
Clerk Supreme Court.

UNITED STATES OF AMERICA,

IN THE

SUPREME COURT.

OCTOBER TERM, A. D. 1878.

GEORGE B. FAIRFIELD, *Plaintiff in Error,*
vs.
THE COUNTY OF GALLATIN.

BRIEF, FOR PLAINTIFF IN ERROR.

CULLOM, SCHOLES & MATHER,
O. J. BAILEY, and
J. H. SEDGWICK,
ATTORNEYS FOR PLAINTIFF IN ERROR.

H. W. Rokker, Printer, Springfield.

UNITED STATES OF AMERICA.

IN

SUPREME COURT.

OCTOBER TERM, A. D. 1878.

GEORGE B. FAIRFIELD,
Plaintiff in Error,
vs.
THE COUNTY OF GALLATIN.

STATEMENT OF THE CASE.

This suit was instituted in the Circuit Court by a citizen of New York to recover on something over five thousand dollars of Interest Coupons of the County of Gallatin, Illinois, belonging to an issue of one hundred thousand dollars of Donation Bonds, voted by it to aid in the construction of the Illinois South-Eastern Railway Company, under authority contained in the Charter and Amendments of that road.—pp. 3 to 15 of Transcript of Record.

The defence was, that a provision of the Illinois Constitution of 1870, hereinafter cited and quoted, forbid the issuing of *Donation* Bonds, after the adoption of the Constitution, July 2, 1870, under any circumstances.

It was claimed in reply, by Plaintiff in Error, that the saving clause to said provision permitted the issuing of *Donation* Bonds after July 2, 1870, where they had been authorized by a vote of the municipality, had before that date, under some law authorizing the vote, as were the facts in this case. See special findings on pp. 13 and 14 of T. It was further urged upon the Court below that the Supreme Court of Illinois had *so* construed this Constitutional provision, in a case hereinafter referred to, and that such construction was binding upon the Federal Courts.

The Circuit Court, however, gave judgment for Defendant solely upon the ground of a *subsequent* decision of this Court conflicting with the Illinois decision.—p. 20 of Transcript.

ERRORS ASSIGNED.

The errors assigned are—

1st. That the Circuit Court followed the *subsequent* decision of this Court instead of the *prior* decision of the Illinois Supreme Court construing a peculiar provision of the Illinois Constitution of 1870, and found for Defendant below, instead of for Plaintiff.

2d. That the Circuit Court admitted the County to contradict the date of the Bonds and show they had been antedated.—pp. 16 and 17 of Transcript.

BRIEF AND ARGUMENT.

The Record in this case presents a very important question, involving the construction of a certain provision of the Illinois Constitution of 1870, together with the right of the non-citizen holders of several millions of Illinois Railroad Aid Bonds to sue upon and collect the same in the Federal Courts of that State.

The clause of the Constitution referred to is found on p. 74 of the Illinois Revised Statutes of 1877, and reads as follows:

"No county, city, town, township or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of, such corporation: *Provided, however*, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption."

The main question presented by the record is, whether the donation of one hundred thousand dollars of Aid Bonds by Gallatin County, where the vote was had before the adoption of the Constitution under a law authorizing it, but the Bonds were not issued until after July 2, 1870, comes within the saving clause of the foregoing Constitutional provision.

It may be as well to state here that this Court and the Supreme Court of Illinois have each made a decision on the construction of this Constitutional provision at variance with each other.

Town of Concord v. Savings Bank, 92 U. S., p. 625.

C. & I. R. R. Co. et al. v. Pinkney et al. 74 Ill., p. 277.

The decision of the Supreme Court of Illinois was made *after a re-argument* of the case at its September Term, 1874, but not published until after the decision by this Court of the "Concord" case.

Neither the attention of this Court nor of the Federal Circuit Court, was called to the fact, while the Concord case was being tried and submitted, that the Constitution of Illinois, bearing upon this question, had already received the deliberate and positive construction of its own Supreme Court.

The language of the Illinois Court in construing this provision

of its own State Constitution, is so pointed, and at the same time *the question* is so peculiarly its province to decide, that we will be pardoned for quoting at some length.

"At the time the section of the constitution referred to was framed, large sums of money in different parts of the State had been voted by municipalities to be subscribed and donated to railroad companies, on condition that roailroads then being constructed should be completed within a given time, and the country, whether wisely and judiciously or not, seemed to demand that in cases where the people in these municipalities had, under then existing legislation, voted to aid railroads by subscription or donation prior to the adoption of the constitution, that such subscription or donation should not be effected by the formation of the constitution.

"And we have no doubt it was in view of this demand of alarge portion of the State that the proviso was engrafted in the foregoing section.

"It is conceded by appellees that the proviso saves subscription to stock previously voted, but they insist that it does not save donations voted. We cannot adopt a construction so narrow and technical. A reasonable construction of the whole section will embrace donations as well as subscriptions. In one sense of the term a donation is a subscription to the capital stock of a company.

"We have no doubt at the time the section was framed there were in the State quite as many donations voted as there were subscriptions to stock in any other manner, and if a necessity or reason existed to protect a subscription, there was also the same reason and demand to protect a donation, and we entertain no doubt it was the intention of the framers of the constitution, by adding the proviso to the section cited *supra*, to place subscriptions and donations on the same footing.'

This, being the authoritative construction of this provision of the Illinois Constitution by its Supreme Court, and in view of the dockets of the Federal Courts therein being crowded with suits by non-citizen bondholders of Donation Bonds, issued since July 2, 1870, but voted under existing laws before, the very important question to this class of litigation arises, whether this Court will

adhere to its ruling in the Concord case, or will so modify its decision as to conform to the views expressed in the *prior* decision of the Supreme Court of Illinois.

With a few exceptions, we understand the rule adopted by this Court to be, that it will observe the construction given by the Courts of the State to their Constitution and Laws, when such construction is settled *or can be ascertained.*

Polk v. Wendell, 9 Cranch, 98.

Uniformly, does it act under a desire to conform its decisions to those of the State Courts upon local laws forming rules of property.

24 How. 427.

In Leffingwell v. Warren, 2 Black, 603, the Court says, the construction given to a statute of a State by its highest judicial tribunal, is regarded as part of the statute, and is as binding upon the Courts of the United States as the text.

In the case of Nesmith v. Sheldon, 7 How. 818, it is said: "It is the established doctrine of this Court that it will adopt and follow the decisions of the State Courts in the construction of their own Constitution and Statutes, when that Constitution has been settled by the decision of its highest judicial tribunal."

In Walker v. State Harbor Commissioners, 17 Wall., p. 651, it is said: "This court follows the adjudications of the highest Court of the State. Its interpretation is accepted as the true interpretation, whatever may be our opinion of its original soundness."

The rule has been lately stated by a Federal circuit judge, in a recent decision in the Eastern District of Michigan, case of Sanford v. Town of Portsmouth, Central Law Journal, Vol. 6, No. 8, where he says: "The judicial decisions of the several States upon

questions of general law, are not obligatory upon the Federal Courts, but they are bound by the Constitutions and Laws of the several States, and by the construction given to such Constitutions and Laws by the Courts of the State."

It is said in Olcott v. Supervisors, 16 Wall, p. 689, "It is undoubtedly true, in general, that this Court does follow the decisions of the highest Courts of the States respecting local questions peculiar to themselves, *or respecting the construction of their own constitutions and laws.* But * * it is only decisions upon local questions —those which are peculiar to the several States, *or adjudications upon the meaning of the Constitution*, or Statutes, of a State, which the Federal Courts adopt as a rule for their own judgments."

In the State Railroad Tax Cases, 2 Otto, 618, the language of the Court is: "As the whole matter, then, concerns the validity of a State Law, as affected by the Constitution of the State, that question, and the other one, of the true construction of the Statute, belong to the class of questions in regard to which this Court still holds, with some few exceptions, that the decisions of the State Courts are to be accepted as the rule of decision for the Federal Courts."

The exceptions, where this Court has refused to follow the construction given to State Constitutions and Statutes by their own judicial tribunals, are stated by his Honor, Justice Davis, in Elmwood v. Marcy, 2 Otto, p. 294. The decisions of the Illinois Supreme Court "adjudge that the bonds are void, because the laws which authorized their issue were in violation of a peculiar provision of the Constitution of Illinois. We have always followed the highest Court of the State in its constructions of its own Constitution and Laws. *It is only where they have been construed differ-*

ently at different times; that in cases like this, we have adopted as a rule of action the first decision, and rejected the last."

Among the reasons given in the above case for not conforming to the State Court decisions, is the one, that where the State Court has changed its decisions, and rights have been acquired under the former, they should not be lost by a change of opinion in the Court.

Elmwood v. Marcy; supra.

Does not this rule consistently apply both ways? For instance: if the State Court has *first* interpreted the State Constitution, so that, a large class of negotiable securities, already on the market, are held to be valid and binding obligations, will this Court not apply the above general rule, by modifying its *subsequent* decision, so as to save the rights of parties into whose hands these securities may have come, since, and upon the faith of, the State Court decision?

Adherence, by this Court, to its "Concord" decision, results in a loss and destruction of these rights, so far as their enforcement in the Federal Courts is concerned, whereas, if the rule of conformity be applied, such rights are preserved.

If it is advisable to apply the *exception* of 'non-conformity,' to save such vested rights, certainly, it would be judicious to apply the *general rule* of 'conformity,' for a like purpose, where it may properly be done.

If the first, instead of the last, construction of the State Court is followed, in order to save vested rights acquired under the first decision, though an exception to the rule of this Court be thereby created; and if the sole object, and excuse, for thus departing from the general rule of conformity, be to save these rights, then we can, with reason, urge an observance, by this Court, of its *general rule* of 'conformity' in the case at bar, where the result, and object, both are, to save such rights.

The bonds in question were issued, as the record shows, in 1870, consequently they had been on the market about five years before the announcement of the Concord decision by this Court, and about one year after the Pinkney decision, and before the Concord decision. If these bonds have, as is probable, changed hands since the "Pinkney" decision, and before the "Concord" decision, then the case is presented where this Court has refused to follow changes in the decision of the State Courts which would unsettle a rule of property. Why should it *adhere*, then, *to a change* made *by its own subsequent decision*, and which equally unsettles the rule of property established by the prior State Court decision?

This Court refused to conform to the changes in the State Court decisions, on the very ground of unsettling these established rules of property, in the cases of

Pease v. Peck, 18 How.

Butz v. City of Muscatine, 8 Wall.

Pine Grove v. Tolcott, 19 Wall.

In the case of County of Cass v. Johnson, recently decided, the former decision of Harshman v. Bates County was so far modified as to conform to the adverse holding of the Missouri State Supreme Court upon the constitutionality of laws similar to the one in question.

A case, just in point, in all particulars, but one, with the case at bar, was recently decided by this Court in conformity to the general rule above stated, to-wit: the case of East Oakland v. Skinner, 4 Otto, p. 255. This Court reversed the judgment of the Federal Circuit Court so as to conform to the prior decision of the Supreme Court of Illinois in Campbell v. Paris and Decatur R. W. Co.

et al., as to the construction of a peculiar provision of an Illinois Statute.

71 Ill, 611.

It cannot be claimed that the Court was following *a line of decisions* of the Illinois Supreme Court in thus conforming to Campbell v. the R. R. Co., because the question presented to the Illinois Court was of first impression. The reason of conforming to it is in harmony with the above general rule of this Court, and is adverted to in the decision itself, on p. 257, 4 Otto, where it is said: "If the Supreme Court of a State gives construction to the language of a Statute, *and there have been no conflicting decisions*, this Court, as a general rule, follows the construction thus given;" and cites Elmwood v. Marcy, 92 United States, 289. That case, conforming to the construction given in *one* State Court decision, rendered valueless in the Federal Courts near half a million of bonds issued to the Paris and Decatur R. R. Co.; conforming, in the case at bar, to the prior State Court construction *of a constitutional provision*, will restore the right of action in the Federal Courts to the non-resident holders of several million of Illinois donation aid bonds.

As intimated, there is only one distinction, or reason, why the rule of conformity should be applied in the one case and not in the other, viz: The attention of this Court was called to the prior decision of the Illinois Supreme Court on the construction of the Paris and Decatur R. R. charter, *before* it decided the East Oakland case; whereas, its attention was not called to the decision of the "Pinkney" case by the Illinois Supreme Court before it decided the "Concord" case. The decisions of the Illinois Supreme Court were, however, *prior*, in point of time, equally in both instances, and in both cases, also, the Illinois Supreme Court rendered its decision *after* the bonds in question had issued.

It seems to us, if there was reason and propriety in conforming to the State Court decision in the East Oakland case, where only the construction of a *statute*, without any *constitutional* question in it, was involved; or in reversing the "Harshman-Bates" case, to conform to rulings of the Missouri Court on analagous laws, and not on the one directly in question, then there is the more reason and propriety in conforming to the "Pinkney" case, where the Supreme Court of Illinois gives construction to a peculiar provision of its own State *organic* law.

The mere fact of this Court having deceided the question differently, *before it knew* of the decision of the State Court, can be no reason, we presume, for disallowing the general rule to prevail, as expressed in

17 Wall. 651,

Where it is said: "This Court follows the adjudications of the highest Court of the State. Its interpretation is accepted as the true interpretation, *whatever may be our opinion of its general soundness.*"

Is not the "Pinkney" decision, in the language of the decision, in Cass Couuty vs. Johnson, "as a rule of state statutory and constitutional construction, binding upon us."

The general rule of "conformity" was applied again in County of Leavenworth vs. Barnes, 4 Otto. p. 70, where this language occurs regarding a recent decision of the Kansas Supreme Court: "It gives effect and construction to one of its own statutes, and *according to well settled rules, will be followed by this Court.*"

In Sumner vs. Hicks, 2 Black, 532, the emphatic language is used: "In cases involving the construction of a State statute, this Court is bound to follow the judgment of the highest judicial authority of the State."

The leading idea, in this rule of "conformity," so long and well established by the decisions of this Court, is to permit the States themselves, through their own judiciary, to establish local rules affecting property, by thus giving construction to the peculiar provisions of their own constitutions and laws.

The State Court rule has been adopted just the same, as is evidenced by the foregoing opinions, whether it affected real estate rights or commercial securities. These commercial securities, in Illinois, in the form of her railroad aid bonds, are of such magnitude, and the securities, from their very character, change ownership so often and readily, that certainly a rule of property affecting them is as important to adhere to as a rule of property affecting real estate.

These one hundred thousand dollars of Gallatin Co. donation bonds were on the market one whole year after the rule of property deciding them valid had been announced by the Supreme Court of Illinois. Whatever doubts, if any, citizens of other States may have had prior to then, as to their being equally saved with subscription bonds under the peculiar provision of the Illinois Constitution, certainly such doubts were dispelled, and had a right to be, under all the rulings of this Court, when the Illinois Supreme Court, whose peculiar province it was to construe its own constitution, announced this decision, and such citizens thereafter, and until this Court announced a different construction, had a right to purchase or hold such bonds and coupons, with the assurance that they could enforce their collection, when necessary, in the Federal Courts of Illinois. Should this Court now, however, decline to conform to the rule of property as thus fixed by the prior decision of the State Court, a large per cent of the value of these bonds are lost to non-Illinois holders, by their being deprived of the right and convenience of action in the Federal Courts.

If they are valid bonds in the State Courts, by reason of the State Court having exercised the right so to declare them, under a peculiar provision of its own State Constitution (because it was only in view of that provision that any question at all was, or is, raised about them), then why should not the Federal Courts be open for the collection of them as well as the State Court?

The Federal Court, by adhering to its Concord decision, cannot invalidate the bonds, but only deprive the non-resident holder of his right of action thereon in such courts, which would produce one of the very evils sought to be obviated by this rule of conformity.

Where this Court has in several instances declined to conform to the State Court decisions, it has been done *to save* rights, not *to destroy* them, as it was in the cases of

Pease vs. Peck, 18 How.

Pine Grove vs. Tolcott, 19 Wall,

Where peculiar circumstances existed for not conforming. In the first case, the law which was finally declared to be unconstitutional, had been on the statute book thirty years, and great property interests acquired under it. In the latter case, the whole current of judicial opinion throughout the country had been that similiar acts to those of the Michigan Legislature were constitutional and valid, and subsequent legislation, equivalent to judicial construction, had recognized their validity, so that to prevent the loss and destruction of property interests, grown up under such legislation while it was universally regarded as valid, did this Court refuse to conform.

These were exceptional cases, with extraordinary circumstances attending them, calling for a deflection from the general rule.

But the case at bar is one where the Supreme Court of Illinois in pointed and unmistakable language, has construed the meaning of peculiar provision of its own State Constitution in a manner that renders valid these securities in question. There has been no adverse decision of that Court, but on the contrary its rulings in other cases bearing on the question, have been in entire harmony with it. Thus, in Chinquy v. the People, 78 Illinois, p. 576, it is held that the *vote* of the people to donate creates the indebtedness, and that it is not necessary for the bonds actually to issue to make it binding. In that case the vote was taken before the adoption of the new Constitution of Illinois, but the bonds did not issue until after such adoption. To defeat the bonds, the eighth Section of Article 9 of that Constitution was involved, which reads as follows:

"County authorities shall never assess taxes the aggregate of which shall exceed 75 cents per $100 valuation, *except for the payment of indebtedness existing at the adoption of this Constitution*, unless authorized by a vote of the people of the county."

The question was: Did the vote alone, the bonds not having been issued, create an existing indebtedness? The Court says yes. The vote of the people makes the indebtedness, and a *mandamus* would compel the county to issue the bonds as evidence of that indebtedness. And this seems to us, having had experience of the views of the people generally, in casting such votes, to be the sound view. The people, by their vote, made a donation of credit to the railroad company. It is like a bond to be performed upon certain conditions, but yet a binding obligation upon the obligor as soon as signed and sealed. Upon the faith and credit of that bond the obligee goes on and performs the conditions. He demands a compliance with the bond. It will not do for the obligor to plead

that since maturing the bond he has become incapacitated to make obligations of that sort.

Neither have the people of a township, who have, by their loan of credit to a railroad company through the ballot box, a right to say, to defeat such loan, that since making it they are incapacitated to make such loans; for the railroad company has been building its road all along largely upon the faith and credit of such donation or loan of credit. It has made its plans with reference thereto, and expended money and labor, perhaps altered the course of the road with these very bonds or money, which the people of this county have voted, in view. It has obtained credit from others on the credit of such donation at the ballot box. It would never do to permit the county to plead an inabliity arising after such donation to defeat a demand for the thing donated or the evidences of it. The estoppel against doing that, must, from the very nature of the case, begin to work as soon as the vote of the donation is taken, and the county could not be heard to say after that vote, that there was no contract, without serious injury to many interests based on its pledge.

In this respect a vote of donation may differ from a vote to subscribe. If the people vote to donate, that is a loan of credit *ipso facto*. If, on the other hand, they vote to subscribe, it might well be contended that the vote contemplated a subscription before there was anything binding the town.

In the Pinkney case, above cited, the Illinois Supreme Court says that there was as much necessity to protect a donation as a subscription, and that, without doubt, was the intention of the framers of the new Constitution of Illinois, to put both on the same footing.

That Court is presumed to know more about the true construction of that Constitution than any other, as its judges are more engaged in that branch of judicial investigation than are other judges, and besides, they are of the people of that State and know their circumstances and needs and purposes and habits better than could other judges. As to the article of the Constitution passed on, it is certain that they have rightly judged that the aims and the needs of the people of that State as much required that donations voted prior to July 2, 1870, when the Constitution was adopted, should be faithfully carried out, as votes for subscriptions.

Scan the article and the proviso closely. Was it necessary to put the words "donations or loans of credit," in the proviso in order to save votes for such donations or loans already had? The Constitution speaks from the time of its adoption, July 2, 1870. It says: "No city, etc., shall ever * * * make donation to or loan its credit in aid of such corporation." That is, it shall not do so in the future. But suppose it had already loaned its credit to a corporation before July 2, 1870. The Constitution does not affect such loan. And we have already seen that the loan of credit is completed at the ballot box. So also with a donation. That is made by the people at the ballot box. The subsequent delivery of the bonds is only to evidence that donation or that loan of credit.

As we have already remarked, the vote to *subscribe* might need an actual subscription to make it effective. Hence the proviso in the Constitution dispensing with the actual making of such subscription, might be deemed unnecessary, and therefore the framers of the Constitution inserted it, not intending thereby to discriminate against donations and loans of credit, but deeming them perfected at the ballot box, and having no need of a proviso to preserve them.

The same question, decided in the "Pinkney" case, came again before the Supreme Court of Illinois in Town of Middleport v. Ætna Life Insurance Co. 82 Ill. 568. The Court decides that case adversely to the bonds on other grounds, but manifests no inclination to reconsider or go back on its opinion in the Pinkney case. See p. 586 of that volume.

It is apparent, therefore, that the uniform current of Illinois decisions is in favor of the view that as to donations and loans of credit where the vote was had prior to the adoption of the new Constitution according to law, the vote itself was a binding obligation on the people upon which the subsequent adoption of that Constitution had no effect.

And as there is no opposing holding of that Court, the Supreme Court of the United States will feel bound to make its rulings on that question conform to the rulings of the Supreme Court of Illinois, as we believe.

CULLOM, SCHOLES & MATHER,
O. J. BAILEY, and
J. H. SEDGWICK.
Atty's for Plaintiff in Error.

UNITED STATES OF AMERICA,

IN THE

SUPREME COURT.

OCTOBER TERM, A. D. 1878.

GEORGE B. FAIRFIELD, *Plaintiff in Error,*
vs.
THE COUNTY OF GALLATIN.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

CULLOM, SCHOLES & MATHER,
O. J. BAILEY, and
J. H. SEDGWICK,

ATTORNEYS FOR PLAINTIFF IN ERROR.

H. W. Rokker, Printer, Springfield.

UNITED STATES OF AMERICA.

IN

SUPREME COURT.

OCTOBER TERM, A. D. 1878.

GEORGE B. FAIRFIELD,
Plaintiff in Error,
vs.
THE COUNTY OF GALLATIN,

We refer the court to *two* acts of the Legislature of Illinois one approved March 17, 1874, and the other May 29th, 1877, as being legislative *constructions* of the constitutional provision in question.

Rev. Stats. of Ill., 1874, p. 797.

Rev. Stats. of Ill., 1877, p. 757.

The two acts read as follows :

"AN ACT to limit and determine the time for which counties, cities, townships, towns and precincts, in this state, shall be liable and holden to issue aid for the building of any railroad in pursuance of any vote taken in conformity to the laws of this state. [Approved March 17, 1874. In force July 1, 1874.]

33. LIABILITY TO ISSUE AID BONDS LIMITED.] *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That the liability of all counties, cities, township, towns or precincts, which have voted aid, donations or subscriptions to the capital stock of or to any railroad company, in conformity to the laws of this state, for the building of or in aid of the building of any railroad to, into, through, or near such county, city, township, town or precinct, to issue such voted aid, shall cease and determine upon and after the expiration of the term of three years from and after the first day of July next; and no bonds shall be issued or stock subscribed to any such railroad company after such time, upon account of or upon the authority of such vote: *Provided*, this act shall not apply in any case where the express conditions of the vote for such aid shall extend the time for the aforesaid building beyond the time aforesaid: *And it is further provided*, that it shall not apply in any case where the aid voted shall have been or shall be already issued within the period aforesaid, and paid over to such railroad company or their legal representatives, or in any case where any railroad shall have been or shall be built within said period, in accordance with the conditions of the vote for aid to such railroad: *And it is further provided*, that it shall not apply to any case where such aid shall have been or shall be deposited within said period with any trustee or trustees, upon written or printed conditions, to be delivered to such railroad company at some future time: *Provided, further*, that this act shall not be construed so as to require any county, city, township, town or precinct to issue, pay or deliver any such aid or bonds where the same may have been voted upon any condition or conditions which are not complied with within the time expressed in the notice of election, proceedings or vote authorizing such aid to be paid or given."

AN ACT to amend an act entitled "An act to limit and determine the time for which counties, cities, townships, towns and precincts in this State, shall be liable and holden to issue aid for the building of any railroad in pursuance of any vote taken in conformity

to the laws of this State," approved March 17, 1874. Approved May 29, 1877. In force July 1, 1877.

SECTION 1. [LIMITS TIME FOR ISSUING BONDS—EXCEPTIONS.] Be is enacted by the people of the State of Illinois, represented in the General Assembly, That an act entitled "An act to limit and determine the time for which counties, cities, townships, towns and precincts in this State, shall be liable and holden to issue aid for the building of any railroad in pursuance of any vote taken in conformity to the laws of this State," approved March 17, 1874, be amended so as to read as follows :

That the liability of all counties, cities, townships, towns or precincts, which have voted aid or donations to or subscriptions to the capital stock of any railroad company in conformity to the laws of this State for the building, or in aid of the building, of any railroad to, into, through or near such county, city, township, town or precinct, to issue such voted aid, shall cease and determine upon and after the 1st day of July, A. D. 1880 ; and no bonds shall be issued, or stock subscribed, to any such railroad company after that date upon account of or upon the authority of such vote: *Provided*, This act shall not apply in any case where the express conditions of the vote for such aid shall extend the time for the building of such railroad beyond the said date; *and it is further provided*, That this act shall not apply in any case where any railroad shall have been built or shall before said date be built, in accordance with the conditions of the vote for aid to such railroad ; *and it is further provided*, That this act shall not apply to any case where such aid shall have been deposited, or shall before said date be deposited with any trustee or trustees, upon written or printed conditions to be delivered to said railroad company at some future time: *Provided further*, That this act shall not be construed so as to require any county, city, township, town or precinct to issue, pay or deliver any such aid or bonds where the same may have been voted and subscribed upon any condition or conditions which shall not be complied with within the time expressed in the notice of election, proceedings or vote authorizing such aid to be paid or given.

APPROVED May 29, 1877.

The acts were passed by *different* legislative assemblies of Illinois, and, it will be noticed, so construe the proviso to the

constitutional clause in question, as to allow *donation* bonds, as well as subscription bonds, to issue as late as March 1874, and July 1880, when the same have been voted in conformity to existing laws, and even beyond these dates where the conditions of the vote provide for it.

These distinct legislative constructions, speak the general understanding of the people of the state, as thus reflected through their representatives as to the meaniug of the *proviso* in question, iu putting donations and subscriptions upon the same footing.

We have then this legislation, and three distinct decisions of the Supreme Court of Illinois, holding or recognizing the doctrine, that a correct construction of the constitutional provision in question, *saves donations*, equally with subscriptions.

1st. The case of the C. D. & V. R. R. Co. et nl. vs. Smith, 62 Ill. p. 277,

where Justice Thornton, in delivering the opinion of thc Court, says: "The remaining question is, *whether* a distinction exists between a donation in aid of the road and a subscription to the capital stock of the corporation. The distinction is more apparent than real; indeed, to our view, is entirely shadowy."

Next came the "Pinkney" decision, already cited. Next the decision of Middleport vs. A. L. Ins. Co., 82 Ill. p. 568, wherein the doctrine of the "Pinkney" decision is alluded to and distinctly recognized.

If there was a dissenting opinion in the "Pinkney" case, as stated in appellee's brief, still the case was decided upon *rehear-*

ing, and the opinion in it *refiled*, as appears from a certified copy of the opinion.

After this deliberate decision of the question in the Pinkney case, and these other decisions in 62d and 82d Ills., and the leg islative construction to the same effect by two General Assemblies, and two distinct acts, it is not at all likely, as supposed by appellee, that the Supreme Court of Illinois will *shift* this construction of its own State constitution.

In the Town of Pana vs. Lippincott case, referred to by appellee as a case in wnich the Supreme Court would be likely called upon to review the "donation" question, we may venture the opinion that this is hardly probable, as the case involves numerous other points upon some of which the case went off in the Appellate Court without apparently any reference to this point.

Certainly, in view of these three decisions of the Illinois Supreme Court and the two acts of "construction" by its legislature, the question has become *settled*, and if the Illinois Supreme Court should *hereafter* change its opinion there would be no more excuse for this court to *follow the change* than there would be for it to follow the *latest* decision of the Missouri Supreme Court in its construction of the Missouri Township Aid act.

In this class of cases the rule of this court is to follow the *Firtt* decision instead of the last, and certainly there can hardly be any option about this when the Illinois decisions are all one way, as yet, and nothing but *remote probability* of there being a change.

However sound and well considered may be either the opinion of the Federal courts or the State courts, each yields to the other by a well recognized rule of conformity, where their opinions respectively construe the meaning of the Federal or State constitution, so that in this case the question is not whether this court, in its Concord decision, has more soundly construed the Constitution of Illinois than has its own Supreme Court and legislature, but rather *is it the peculiar province* of the Illinois Supreme Court *to construe it*, and if so, has it construed it, and if it has, then, no matter what the views of this court is, as to its soundness, it will conform.

Respectfully submitted,

CULLOM, SCHOLES & MATHER,
O. J. BAILEY & J. H. SEDGWICK,
Att'ys for Plaintiff's in Error.

UNITED STATES OF AMERICA,

IN THE

SUPREME COURT.

OCTOBER TERM, A. D. 1878.

GEORGE B. FAIRFIELD, *Plaintiff in Error,*
vs.
THE COUNTY OF GALLATIN.

BRIEF FOR DEFENDANT IN ERROR.

A. L. KNAPP,
DUFF. BOWMAN,
AND
BLUFORD WILSON,
ATTORNEYS FOR DEFENDANT IN ERROR.

H. W. Rokker, Printer, Springfield.

UNITED STATES OF AMERICA.

IN

SUPREME COURT.

OCTOBER TERM, A. D. 1878.

GEORGE B. FAIRFIELD,
Plaintiff in Error,
vs.
THE COUNTY OF GALLATIN.

Brief for the County of Gallatin, Defendant in Error.

STATEMENT OF CASE.

The county court of the county of Gallatin, a county lawfully organized and existing under the laws of the state of Illinois, at an election of the legal voters of said county, held on the 28th day of February, 1868, under the provisions of the charter of

the Illinois South-Eeastern Railway Company, was authorized to subscribe one hundred thousand dollars, and to *donate* an additional one hundred thousand dollars of its bonds in aid of the construction of said railway company.

But the condition upon which the said bonds had been voted were not complied with until the 6th day of October, 1870, and on that day the Springfield and Illinois South-Eastern Railway Company, the successor, by lawful consolidation, of the Illinois South-Eastern Railway Company, made application through its president, to the county court for the delivery of the one hundred thousand dollars donation bonds.

The court, by an order dated October 8, 1870, directed said bonds to be executed and delivered to the said consolidated railroad company.

The bonds were accordingly executed and delivered on the same day, but were ante-dated the first day of January, 1870, by some understanding between the county officers and the officers of said railroad company.

The coupons in suit, among others, were attached to the said donation bonds.

On the second day of July, 1870, before the delivery of said bonds, the new constitution of the State of Illinois went into effect.

This suit was instituted in the United States Circuit Court for the Southern District of Illinois, by a citizen of New York, to recover on said coupons.

The county rested its defense on the authority of Concord vs. Portsmouth Savings Bank. 2 Otto, 625.

The circuit court upon that authority rendered judgment for the county.

The plaintiff in error now insists—

1. That the circuit court erred in following the decision of this court in the Concord case, instead of the prior decision of the Illinois Supreme Court, in the case of Chicago and Iowa Railroad Co. vs. Pinkney, 74 Ill. 277.

2. That the circuit court erred in permitting the county to contradict the date of the bonds, and show they had been antedated.

BRIEF.

The sole issue, as we believe, presented by the record in this, case, is whether this court will reverse its well considered and unanimous opinion rendered in Concord against Portsmouth Savings Bank, construing a clause in the Constitution of the State of Illinois, forbidding the issuing of donation bonds in order to conform to a state decision, made in the mean time by a divided court, in a case in which, for aught that appears in the record, the point was first raised in the Federal Court and both of which decisions were long subsequent to the issuing of the bonds in question.

The section of the constitntion referred to is as follows:

"*No county, city, town, township or other municipality, shall ever become subscriber to the capital stock of any railroad or*

private corporation, or make donation, or loan its credit in aid of such corporation; provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption."

Ill. Revised Statues, 1877, p. 74.

I.

On the legal merits of the controversy we submit that, under the section of the constitution above mentioned, the bonds in question were void for the want of power at the date of their issue, and are therefore void, even in the hands of an innocent purchaser.

It is fundamental law in a case such as this, touching the validity of municipal securities, that the authority to contract must exist before any protection to an innocent purchaser can be claimed by the holder.

Marsh vs. Fulton, 10 Wallace, 683.

In this celebrated case the court quoting from 7, Wallace, 676, say: "*In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection, which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued.*"

The bonds were executed and delivered by the county authorities, as we have seen, on the 8th day of October, 1870, over three months subsequent to the adoption of the new constitution, which took effect July 2, 1870; but by some understanding between the county officers and the railroad officers the bonds were ante-dated the 1st day of January, 1870. Record p. 19.

The circuit court admitted proofs of such ante-dating. The admission of such proof is one of the two errors assigned. The counsel for the plaintiffs *in error* content themselves with the mere assignment, at page 2 of their brief, and do not again allude to it therein. The point in error is not well made. The ruling of the circuit court was according to precedent.

Bayley v. Taber, 5 Mass., 286.

Anthony v. Jasper county, Dillon's Law of Municipal Bonds, page 47, *n.*

But, independent of these authorities, there was enough on the bonds to put a prudent man on inquiry. Section 13 of the act to incorporate the Illinois and Southeastern railway company provides, among other things: "That upon a full and complete performance by said company of all the conditions upon which said bonds were to become binding obligations of the counties issuing the same, it shall be the duty of the county court, or the board of supervisors, where such county is under township organization, of the respective counties making such donation, to enter an order upon their records, at a regular or special term of their court, directing the clerk of said court to

certify over his official seal, upon the back of each of said bonds so issued, in language as follows, viz: 'All of the conditions upon which this bond was to become a binding obligation of the county of Gallatin have been complied with.'" Record p. 13.

This is printed in full upon the back of each bond in controversy, and each of them bear the certificate of the county clerk, as above, under date of 8th October, 1870. Record, p. 15.

Under the law cited, this certificate could not lawfully be made. except upon the full and complete performance of all the conditions, and until the certificate was made and placed upon the bonds, a material point of evidence that the bond had become due and payable, was wanting. The certificate states "that the county court of said county have entered an order on the records of said county court, directing me to endorse upon this bond the following words, to wit: "All the conditions upon which this bond was to become a binding obligation of the county of Gallatin, have been complied with." Dated the 8th of October, 1870. There was, therefore, in the bonds themselves a plain conflict as to the date when they became binding obligations of the county. By the date in the body of the bonds, they were issued January 1, 1870. By the date on the certificate of the clerk, under the seal of the county court, they were not issued until October 8, 1870. This was enough to incite inquiry. And if there was any doubt whatever as to the time of issuing of the bonds, inquiry at the only place where inquiry should have been made, to wit: "The records of said county court" would have shown just when the conditions were

complied with, when the bonds were issued and when the certificate was ordered to be made, to wit: 6th and 8th of October, 1870.

The purchaser would have found the records equally, with the certificate of the county clerk, in direct conflict with the date on the face of the bond, and the effort to avoid the utter want of power by ante-dating, would have been at once apparent.

"If (says Judge Dillon) the protective and prohibitory provisions of the constitution can thus be evaded and rendered useless by the act of an officer of the county, the power to defraud is endowed with a fearful vitality."

Dillon Municipal Laws, supra.

II.

The plaintiff's in error, as we have seen, rely upon the case of the Chicago and Iowa R. R. Co. et al., vs. Pinkney et al., 74 Ill. 247. We insist that this case is not sound law, and should not govern this court in the case now before it. The decision in the Pinkney case, it will be seen, was by a divided court. It failed to receive the approval of the same court when an appropriate opportunity was offered, and it has been flatly overruled by the unanimous opinion of this court. 92 U. S. 625.

The opinion in 74 Ill., upon its face shows it was not well considered. No authority, whatever is cited in support of it, and when compared with the opinion of this court upon the same subject, it seems as destitute of reason as it is of authority.

It cannot be denied that the construction put upon the sec-

tion of the constitution under consideration, by the Supreme Court of Illinois, is at war with all rules of interpretation known to the law, while the construction given to it by this court, independent of the cogent reasons assigned as arising out of the subject matter and objects of the section and the proviso, is also fully sustained by all well established canons of construction recognized by the courts. The purview of this section of the constitution is broad, sweeping and absolute in its terms of denial, saving and excepting nothing. Nor is there a word pointing to any future saving clause, so that whatever matters of right are saved from this general inhibition, must be found in the very words of the subsequent proviso.

There is a well recognized distinction between an exception in the enacting clause of a statute and a proviso.

Potter's Dwaris on Statutes, Ed. 1871, *pp.* 118-9 *and notes.*

The proviso of this section of the constitution of Illinois is properly and clearly a proviso as known and defined as such by the books. And donations being prohibited by the purview of the section of the constitution, and not being found in the saving words of the proviso upon every known principle of construction are not saved by the proviso. As early as 1841 this court said: "*Passing from these considerations to another, which necessarily brings under review the second point of objection to the charge of the court below, we are led to follow the general rule of law which has prevailed, and become consecrated almost as a maxim in the interpretation of the statutes. that where the enacting clause is general in its language and objects, and a proviso is after-*

wards introduced, that proviso is construed strictly. and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause ; and those who set up any such exception must establish it as being within the words as well as within the reason thereof." U. S. *vs. Dixon,* 15 *Peters.* The construction given this proviso in 74 Ill. is in the very teeth of the above wholesome and consecrated rule laid down and adopted by this court.

It will be seen that when the Pinkney case was pressed in argument at a subsequent term (82 Ill. 568), the court with a marked brevity dismissed that branch of the argument, and with a reticence full of meaning and significance, as we think, fail to say a word in approval of the case. We invite special attention to the language of the court in this last case. 82 Ill. 568.

The construction given to this section by the Supreme Court of the State of Illinois, is by no means such a well settled construction as entitles it to control this court upon the same question. It is only when the construction of the statute has been settled by a series of decisions of the highest court of the State, differing from the construction of the same given by this court, that the Federal court will recede from its own well considered opinion, and adopt that of the State court.

Green vs. Neal, 6 Peters, 291.

Rowan vs. Runnels, 5 Howard, 135.

And it is only where this well settled construction of a statute by the Supreme Court has become a rule of real property in

the State that this court feels itself bound to adopt such construction of the State court.

Suydam vs. Williamson, 24 Howard, 427.

Gardner vs. Collins et al. 2 Peters, 58; 6 Peters, supra.

Thatcher vs. Powell, 6 Wheaton, 119.

This court is not bound to follow the State courts, even in well settled construction of statutes, where it is manifest that such construction is wrong.

Butz vs. City of Muscatine, 8 Wallace, 582.

The court in this case, refusing to conform to the decision of the Supreme Court of Iowa, says: "Entertaining the highest respect for those by whom they were made, we have yet been unable to concur in the conclusion which they announce. It is alike the duty of that court and of this to decide the question involved in this class of cases, as in all others, when presented for decision. This duty carries with it investigation, reflection, and the exercise of judgment. It cannot be performed on our part by blindly following in the footsteps of others and substituting their judgment for our own."

The inquiry always is, what is the settled law of the state at the time the decision is made. Upon this point it is a matter of no slight significance in connection with what follows, that the opinion relied upon by the plaintiffs in error is that of a divided court.

United States vs. Morrison, 4 Peters, 124.

Green vs. Lessee of Neal, 6 Peters, 291.

Gelpcke vs. City of Dubuque, 1 Wallace, 205.

Pease vs. Peck, 18 Howard, 595.

In the last case at page 599, this court says, "nor do we feel bound in any case in which a point is first raised in the courts of the United States, and has been decided in a Circuit Court, to reverse that decision contrary to our own convictions, in order to conform to a state decision made in the mean time. Such decisions have not the character of established precedent declarative of the settled law of a state."

It is important to note that both federal and state decisions construing this section are subsequent to the issue of the bonds.

The only rule of property applicable at the date of their issue was that of the Constitution of Illinois itself, to be construed and interpreted according to the well settled canons of construction heretofore cited. According to that rule so interpeted, the bonds in question were clearly void *ab initio*, for the want of power.

Nor does the proper construction in the premises, as an original proposition, appear to be difficult or doubtful.

The Chief Justice of the Supreme Court of the State of Illinois and Mr. Justice McAllister, dissenting from the opinion of the majority of the court in the Pinkney case use this language: "*The first branch of the section of the constitution refered to, prohibits subscriptions or donations, or loans, by municipalities, to private corporations. The proviso drops donations and loans of credit, and merely authorizes subscriptions to capital stock where the same had been before voted. This is a donation, and had not been voted as a subscription. It is not therefore within the proviso, but within the prohibition. The constitution clearly makes a distinction between a subscription and donation, and this court is powerless to annihilate it.*"

On reference to the unanimous opinion of this court in the Concord case, it would seem, on comparison with the above, from the similarity of the terms used, and from the identity of the reasons assigned that this court must have had the Pinkney case before it. This court says, on the same point as that covered by Chief Justice Walker, "*this article, in our opinion, makes a clear distinction between subscription to the capital stock of a railroad company, or a private corporation, and donations or loans of credit to such corporations. The latter are prohibited under all circumstances. The former may still be made, if they have been authorized by a vote of the people prior to the adoption of the constitution. A very able and ingenious argument has been submitted to us, aiming to show that in fact the article makes no such distinction, and that donations and subscriptions are put upon the same footing; but we cannot yield to it our assent. No matter what may have been the intention of the mover of the proviso, the intent of the framers of the article, and of the people adopting it, must be gathered from the article itself. There was reason for the distinction. For subscriptions to capital stock the municipality got something for which there was at least a possibility of return, more than was possible in the case of donation. In both cases public convenience may have been contemplated, but in the one more than that may have been contemplated and expected; and this may have been the prevailing motive for assent to a subscription. It cannot be doubted that a subscription would have been voted in many cases where a donation or loan of credit would not have been.*"

Counsel for the plaintiff in error, say, at p. 4 of their brief, "in view of the dockets of the Federal Court therein being crowded with suits by non-citizen bondholders of donation bonds, issued

since July 2, 1870. but voted under existing laws before, the very important question to this class of litigation arises, whether this court will adhere to its ruling in the Concord case, or will so modify its decision as to conform to the views expressed in the *prior* decision of the Supreme Court."

They, however, abstain from any allusion to the fact that cases involving the same question, are also pending and undisposed of in the state courts of Illinois. At least one of these cases, Pana vs. Lippincott, has been passed upon by the appellate court of the third appellate district of this state, and will doubtless be carefully and elaborately argued before the Supreme Court of the state. Among other authorities referred to by the court, as sustaining its finding against the validity of the donation bonds involved, is the Concord case.

Monthly Jurist, April, 1878.

It is by no means impossible, in view of what precedes, that the decision of this court in the Concord case may yet, at an early day, be accepted by the state tribunals as giving the correct construction of the article of the constitution in question.

There is no warrant in the record for the statement of plaintiff's counsel, at page 2 of their brief, that this case involves several millions of Illinois Railroad Aid Bonds.

It is incredible that millions could have been issued after July 2, 1870, in payment of donations alone. It is well known that none of this class of bonds were left to be issued after July 2, 1870, wherever it was possible by extra efforts on the part of contractors and their lawyers to induce municipal authorities to

issue them prior to that date. When this could not be done resort was had, in many instances, to ante-dating, as in the case at bar, in order to avoid the very question which now plagues the holders of such securities. But, however this may be, the fact that the controversy still goes on in the State tribunals is a valid reason why this court should not make haste to reverse its carefully considered and authoritative decision.

The maxim *stare decisis et non quieta movere* should apply with especial force to the opinions of this court. The State courts may be permitted more latitude. But the evils of frequent fluctuations in the opinions of courts of last resort are innumerable, and undermine all authority. It will be time enough to ask this court to reverse its well considered opinion in the Concord case when it becomes clearly apparent that the decision of the Supreme Court of Illinois in the Pinkney case is authoritatively and finally accepted as the settled law of the State.

A. L. KNAPP,
DUFF, BOWMAN & WILSON,
Att'ys for Defendant in Error.